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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

James E. Bouldin, David W. Bouldin, Helen L. Bouldin (now Bransford), and Weldon M. Bailey,
Plaintiffs in Error.

vs.

Alto Mines Company, a corporation,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

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STATEMENT OF THE CASE

This case involves the title to a portion of th etract of land known as Baca Location No. 3, situated in Santa Cruz County, Arizona. This tract of land has been before the court numerous times and the historical facts are set forth in the opinions of the Supreme Court in *Shaw vs. Kellog,* 170 U. S. 312; *Mase vs. Herman,* 183 U. S. 572; *Priest vs. Las Vegas,* 232 U. S. 604, and *Lane vs. Watts,* 234 U. S. 525, and in the opinion of this court in *Wise vs. Watts,* 239 Fed. 207. Such a

full and clear statement of its origin and history is contained in the latter case that we do not believe it necessary to do more than to ask the court to refer to the opinion in that case.

While the grant was still in controversy before the Department of the Interior, and while that Department treated the lands as a part of the public domain, certain mining locations were attempted thereon, under the laws relating to such locations upon the vacant mineral lands of the United States. In the years 1910 and 1911 the Territory of Arizona and in 1912 the State of Arizona levied and assessed taxes against these mining claims as "patented mines," although no patents appear to be in existence, as the property of Consolidated Mines, Smelter & Transportation Company (Tr. p. 37 to 40). The taxes were not paid, and in 1913 a suit was brought to collect them. The Consolidated Transportation Company and various other corporations and individuals were made defendants, and among them James E. Bouldin and Daisy Belle Bouldin. Service was made by publication. Daisy Belle Bouldin was dead at the time the suit was brought, having died in 1907 (Tr. p. 206). James E. Bouldin resided in Texas. At the time the taxes were assessed the claim to the North half of Baca Location No. 3, upon which these mining claims were located, was owned by James E. Bouldin and the minor heirs of Daisy Belle Bouldin, David W. Bouldin and Helen Lee Bouldin (Tr. p. 28-29).

Default was taken (Tr. p. 85) and judgment was rendered ordering a sale of the mining claims ,describing them by name and by the books and pages of the County records wherein the location notices appeared.

This is an action in ejectment. Judgment was rendered for defendant, a motion for a new trial was made and overruled, and the case is here by writ of error.

ASSIGNMENT OF ERRORS

1. That the Court erred in holding and deciding that the property described in the plaintiff's complaint, or any portion thereof, was subject to taxation by the Territory of Arizona for any year prior to the year 1914, when it was segregated from the public domain, for the reason that prior to the year 1914 said property had not been segregated from the public domain of the United States and taxation thereof by the Territory of Arizona was not authorized, but was contrary to the Constitution and laws of the United States.

2. That the Court erred in holding and deciding that the judgment of the Superior Court of the County of Santa Cruz, State of Arizona, foreclosing liens for taxes for the years 1910, 1911 and 1912, is a valid judgment against the plaintiffs herein and that the sale thereunder is a valid sale and that the said judgment and said sale may not be collaterally attacked, for the reason that during all of

the years for which said taxes were attempted to be levied said property was not subject to taxation by the Territory of Arizona, it not having been segregated from the public domain of the United States; and for the further reason that said taxes were purported to be levied against said property as mining claims which had been located upon public lands of the United States, while in fact said property and all thereof had prior to said attempted location of said mining claims, been granted by the United States and title thereto had vested in the plaintiffs in error, or their grantors, although said lands had not been segregated from the public domain; and for the further reason that the judgment rendered in said Superior Court was and is invalid in the following particulars:

(a) The assessments for the year 1910 are to the Consolidated Mines, Smelter & Transportation Company, and for the year 1912 are to the Alto Copper Company, Albert Steinfeld and H. S. Guerrin, Receivers, and not to plaintiffs in error or their predecessors in title or to any of them.

(b) The descriptions in said assessments were of the mining locations such as are made on the vacant public mineral lands of the United States, and do not describe the lands of the plaintiffs in error or their predecessors in title as the same were granted by the United States, and are insufficient to give notice to the true owners.

3. The Court erred in holding and deciding that the deed made by the Sheriff conveyed the title of the plaintiffs in error or their grantors, for the reason:

(a) The execution does not state the amount due for taxes and interest upon each of the so-called mining claims, and directs the Sheriff to levy upon and sell as under ordinary execution.

(b) The execution does not set forth the amount due upon each separate tract, as is required by law. The Sheriff without right sold eight of the so-called mining claims in one lot for a lump sum, and not separately, for the taxes found to be due upon each separate tract, thus preventing redemption of one without redeeming all.

(c) The levy was only upon mining claims and the sale conveyed no interest in the lands granted by the United States to the grantors of the plaintiffs in error, but only such interest, if any, as was obtained by attempted mineral locations.

(e) The purchase by the Alto Mines Company at the Sheriff's sale operated merely as payment of the taxes.

4. The Court erred in holding and deciding that the one-half interest in the property owned by Daisy Belle Bouldin at the time of her death and which descended to her children, Helen L. Bouldin and David W. Bouldin, was affected by said judg-

ment of said Superior Court of Santa Cruz County, Arizona, or by the sale made thereunder, for the reason that at the time of the institution of said suit in said Superior Court Daisy Belle Bouldin was dead and her heirs, Helen L. Bouldin and David W. Bouldin, were not parties to said action in said Superior Court.

5. That the Court erred in rendering judgment for the defendant in error Alto Mines Company and in not rendering judgment in favor of plaintiffs in error, for the reasons heretofore stated.

ARGUMENT

LAND GRANTED BY THE UNITED STATES TO BE SELECTED FROM THE PUBLIC DOMAIN IS NOT SUBJECT TO TAXATION BY A STATE UNTIL THE LAND HAS BEEN SEGREGATED FROM THE PUBLIC DOMAIN BY AN APPROVED SURVEY, AND THE ATTEMPT TO TAX SUCH LAND BY THE TERRITORY AND STATE OF ARIZONA, PRIOR TO SUCH SURVEY, IS THE EXERCISE OF AN AUTHORITY REPUGNANT TO THE ENABLING ACT OF CONGRESS OF 1910, AND THE CONSTITUTION AND LAWS OF THE UNITED STATES, AND AN UNWARRANTED INTERFERENCE BY THE STATE WITH THE PROPERTY OF THE FEDERAL GOVERNMENT.

Upon this point there is no question as to the construction of statutes of the Territory or State of Arizona, or as to whether the taxes complained of were laid in conformity with such statutes, but the question is whether the Territory or State has the power and authority to assess, levy upon and sell land which has not been segregated from the public domain.

Nor is the question of taxation of an equitable title or claim to particular specific land involved, for such matters may arise only after the land has been in some lawful manner segregated from the public demain. At the time the assessments were made the following conditions existed:

Congress had made a grant of a quantity of land, to be selected by the grantees and located and surveyed by the Government, the granting act expressly providing for the survey. A selection had been made, which was described in general terms as beginning at the base of a mountain. The selection in 1864 had been approved and ordered surveyed, but no survey had been made, and none was made until 1905. This survey was not filed nor approved until December 14, 1914, long after the assessments were made. In 1900, the Land Department had held that the land covered by the Mexican grants was not within the terms of the Act of June 21, 1860, supra, and had thrown it open to the public for entry; and in 1908, the entire selection had been cancelled. The claimants were not in possession of any

land, the whole of it being in possession of settlers claiming under the public land laws and others. Not only were the claimants out of possession, but they were unable to obtain possession by any judicial process. From these facts, the following main conclusions may be had: (1) Although the grantees had made selection, and the Commissioner in 1864 had approved it, the grant stood cancelled, and also the title had not been attached to any particular land distinguishable from the public domain. The grantees were engaged in a contest with the government in an endeavor to obtain title. These conditions continued until the approval of the survey, under the mandate of the Supreme Court, December 14, 1914. (2) The claimants were not in possession of any land and could not get possession until the decision of the Supreme Court, and the approval and filing of the survey. In other words, notwithstanding the selection and its approval, and the passing of title to a general tract, the grant remained cancelled and the land remained public domain until after the decision of the Supreme Court in *Lane vs. Watts,* 234 U. S. 525, and until the lands were segregated by the filing and approval of the survey.

The Supreme Court has held, in cases arising under Section 6 of the Act of June 21, 1860, granting lands to the Bacas in lieu of the Las Vegas Grant, that a survey was essential to segregate the land granted from the public domain.

In *Shaw vs. Kellogg*, 170 U. S. 312, selection No. 4 of the series was involved. In that case selection had been made, survey executed, approved by the Land Department, and the land segregated from the public domain. No patent had been issued, and the question arose whether the act of the Deparrtment was final or not. The Court say:

> "The Grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain minerals. * * * The selection was to be made within three years. The title was then to pass. * * * The Surveyor General of New Mexico was directed to make survey and location of the lands selected. * * * There was not, at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Sec. 2447, Rev. Stat., taken from the Act of December 22, 1854, c. 10, 10 Stat., 599, applies only to the case of a claim to land which has heretofore been confirmed by law. And the same may be said as to the Special Act of March 3, 1869, c. 152, 15 Stat., 342. Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. * * * The Land Department was therefore technically right when it said that the statute did not order the issue of a patent, and

> that the case was one in which the granting act, with the approved survey and location, made a valid transfer of title."

In the litigation which culminated in the Supreme Court in *Lane vs. Watts,* 234 U. S. 525, where this particular selection was before the Court, it was contended by the grant claimants that while title had passed by the approval of the Commissioner and order of survey of 1864, that title had not passed to any definite or certain piece of land, and could not be affixed without a survey; that, for this reason, it was absolutely essential in order to give title to some definite and defined piece of land, that the survy made in 1905 be filed and approved; that until this survey was filed and approved, there was no segregation from the public domain. The Court say:

> "We agree with the courts below that a survey was necessary to segregate the lands from the public domain. *Stoneroad vs. Stoneroad,* 158 U. S. 240. This was done by the Contzen survey, which, we have seen, was directed to be filed by the lower courts without alteration, a decision which we approve."

If, as stated by the Supreme Court, a survey was necessary to segregate the lands granted from the public domain, it must follow that until such survey was made, the land was not segregated and remained a part of the public domain. Therefore, when the assess-

ments for taxes were made, the survey not having been filed or approved, but, on the contrary, the entire grant cancelled and rejected, the land was a part of the public domain. The situation is the same, in so far as the character of the land is concerned, at the times the assessments were made, as if no survey had ever been made, prior to this date.

The fact that the survey was made in the field in 1905, is of no importance. Since April 17, 1879, all surveys, to be of any efficacy, must be approved by the Commissioner, and filed.

Wilson Cyprus Company vs. Del Poso, 236 U. S. 635.

In *Stoneroad vs. Stoneroad,* 158 U. S. 240, a confirmed Mexican grant had been surveyed. The survey differed from the natural boundaries of the grant existing at the time of confirmation, and also a contention was made that the survey was illegal. The Supreme Court, speaking by its Chief Justice, said:

> "We think the confirmatory act of 1860, by necessary implication contemplated that the confirmed grant should be thereafter surveyed, and that such survey was essential for the purpose of definitely segregating the land to which the right was confirmed from the public domain, and thus finally fixing the extent of the rights of the owners of the land. To hold otherwise would be to conclude that Congress had confirmed the claim and yet deprived the claimant of all definite means

of determining the extent of his possession under the confirmed title."

"It is not to be presumed that Congress intended by confirming a grant which had never been surveyed and had therefore, never been distinctly separated from the public domain, to exempt it from the survey essential to its accurate segregation and delimitation, especially when this survey was fully provided for by the general law, in accordance with the uniform public policy of the Government in dealing with questions of this character. * * * Indeed, the idea that the Act, while confirming the title, did not contemplate a survey for making its limits, amounts to the contention that the public domain itself should remain in part forever unsurveyed and undetermined, since a separation of the private claim from the public domain was essential to the ascertainment of what remained of the latter."

"Now, if the survey is illegal and is to be treated as not existing, then we are without the guidance provided by law for the purpose of ascertaining whether the land claimed from the defendant was within or without the area of the grant. In other words, if it be conceded that there is no survey, the plaintiff is without right to relief, since a survey was essential to carry out the confirmatory act."

It will be observed that the title to the lands in question was in the owners of the Mexican Grant, but it was essential that this title be fixed to some particular land, and this could be accomplished only by a survey.

The distinction between the passing of title and segregation of land from the public domain, is clear. As said by the Court, in *Russell vs. Maxwell Land Grant Co.,* 158 U. S. 253, "The survey is one thing and the title another." Grants made by Congress are often in praesenti. Such words as "there be and is hereby granted" are words of immediate donation, and title passes. Leavenworth, etc., Railroad Co. vs. U. S., 92 U. S. 741. Such grants vest a present title, but the survey is essential to give precision to it, and to segregate it from the great mass of the public domain and attach the title to a particular tract. Until the survey has been accomplished and approved, it is the same as if no survey had been made, and the land remains a part of the public domain. It is not the passing of title, but the segregation of the lands, so as to distinguish them from the surrounding public domain, that renders them subject to taxation.

In *United States vs. Montana Lumber Company,* 196 U. S. 753, the Supreme Court said:

> "They (the words 'there be and is hereby granted') vest a present title, though a survey of the lands and a location of the road are necessary

> to give precision to it and attach it to any particular tract. The right of survey is in the United States."

In 1910, 1911 and 1912, therefore, the land in question had not been segregated from the public domain. We believe it to be practically universally held that such lands are not subject to taxation. That line of cases which holds that beneficial titles and beneficial interests may be taxed is clearly distinguishable from the case here. Where the public domain has been surveyed, and equitable titles are initiated, such titles, under some circumstances, may be taxed. In such cases the land has been segregated and the equitable or possessory right is affixed to a certain definite tract. That situation is entirely different from one in which a title may exist, but which has not been affixed to any particular tract of land, and is subject to be placed where the United States may place it, when surveyed, and which has no separate existence until it has been surveyed and located upon the face of the earth.

> "There is, in fact, no such tract of land as that described in the petition until it has been located within the Congressional township by an actual survey and the establishment of the lines under the authority of the United States, and the survey has been approved by the proper U. S. Surveyor General."

Middleton vs. Low, 30 Cal. 605.

In the case of *Territory vs. Persons,* 76 Pac. 316, Supreme Court of New Mexico, there was involved the right of the Territory to tax a Mexican Grant which had been confirmed by the Court of Private Land Claims, but the survey of which had not been approved.

> "The cases above cited, and many others to which reference might be made, conclusively show that without a duly approved survey the decree of the Court of Private Land Claims declaring the validity of the grant in controversy did not become legally effective to pass the title to the land out of the United States. The want of an approved survey is all the more important when it is remembered that the land is being considered from the standpoint of taxation. To constitute a proper subject for taxation, the property must be definite and clearly defined. There must be boundaries from which it is possible to accurately ascertain the premises and the purchaser's rights should a sale for taxes become necessary. In the case of this grant, there can be nothing of this kind in advance of an approved survey. It is true that the complaint speaks of 42,891 acres, more or less, and refers for a more complete description of the tract to 'the description and boundaries thereof on file in the office of the Surveyor General of New Mexico.' But that description and those boundaries were at the date of assessment purely tentative; the survey which embodied them not having been

approved, *non constat*, but that survey, when subsequently presented to the land court was rejected; and that the location of the boundaries and quantity upon which a tax levy is now predicated was declared erroneous. The survey just referred to was not final, and it must be admitted that it was within the power of the land court to reject it. If so, an affirmance of this judgment and a sale of the property for taxes, according to the 'description and boundaries' in the office of the Surveyor General at the date of the assessment, would attempt to convey property that the court subsequently held to belong, not to the claimant, but to a part of the public domain.

"In sustaining the validity of a tax levied upon and assessed against an imperfect grant in advance of the approval of the survey thereof in accordance with the decree of confirmation, the court below erred, and the cause must be reversed. It is so ordered."

Territory vs. Persons, 76 Pac. 316.

"Prior to the survey of lands included in a railroad grant, such lands are not subject to taxation."

State vs. Central Pacific, 21 Nev. 94.

The Supreme Court of Wisconsin, 31 Wis. 359, *Whitney vs. Gunderson,* had held that unsegregated lands might be taxed. It reconsidered the matter, however, and says:

The Act of Congress undoubtedly contemplated that a survey of the land confirmed to Grignon should be made under the direction of the Commissioner of the General Land Office. This was obviously for the purpose of fixing the locality of the tract confirmed to him and his assigns; and until the approved survey was made and a patent therefor issued, it was impossible to determine the boundaries of the tract of land to which title would attach under the grant. And this circumstance distinguishes this case from cases where the lands acquired from the United States have been previously surveyed and segregated from the mass of the public lands. In the latter case possession can be taken of some distinct sub-division which becomes private property, and therefore justly chargeable with the payment of taxes. But in the case before us, the grant was to be located by a survey made under the direction of the Commissioner of the General Land Office, and until this approved survey was made and a certificate as evidence of that fact or a patent issued, the title to no specific tract of land passed under the Act. This we think is the manifest intent of this Act and we were therefore mistaken in holding that it vested in Pierre Grignon and his assigns the equitable title and ownership of any specific tract of land before such tract had been ascertained and designated by the United States survey."

In 1889, the Supreme Court of the Territory of Arizona held that unsurveyed lands were not taxable and should be excluded from the tax list.

Territory vs. Delinquent Tax List, 3 Ariz. 117.

"The appellees' lands were not distinguishable from or segregated from the public lands until a survey and definite location of its boundaries were made under the authority and by the direction of the National Government."

Crittenden Cattle Co. vs. Ainsa, 14 Ariz. 306.

"Hence the land is not to be taxed before its survey and the approval of the survey, nor is it subject to taxation before the full payment and the acceptance of the price by the United States."

27 Cyc. 868.

"Apparently the rule is that unsurveyed lands are not taxable, and the survey is not completed until the same is accepted by the Land Department. *Central Pacific Railway Co. vs. Nevada,* 162 U. S. 512; *City vs. Central Pacific Railway Co.,* 25 Pac. 442; *Stoneroad vs. Stoneroad,* 158 U. S. 240; *United States vs. Montana Lumber Co.,* 196 U. S. 573; *Clemons vs. Gillett,* 83 Pac. 879; *Robinson vs. Forest,* 29 Cal. 325; *Territory vs. Persons,* 76 Pac. 316; *Tubbs vs. Wilholt,* 136 U. S. 134."

Clearwater Timber Co. vs. Shoshone County, 155 Fed. 612.

"The approval and certification of the lands by the Land Department is a necessary preliminary to the identification of the lands taken. Without identification, the grant cannot attach, and until it does attach there is no title that can be the subject of levy and sale for taxes or otherwise."

Altshul vs. Gillings, 102 Fed. 36.

"Until a Spanish grant has been segregated from the public domain by a survey, properly approved, it is not subject to taxation by a state authority, and a sale therof for such taxes is void."

Robertson vs. Sewell, 87 Fed. 536, C. C. A., Fifth Circuit.

"For the purpose of taxation, it should be held that lands are surveyed when they are identified; that is to say, when the survey thereof is finally approved. The grant to the railroad company was a grant *in praesenti*, but title did not vest in any particular tract of land until the same was identified by a government survey. So far as the decisions have gone, the survey and the approval of the survey have been uniformly recognized as the conditions precedent to the vesting of title so as to render lands subject to taxation." 37 Cyc., 868; *Clearwater Timber Co. vs. Shoshone County*, (C. C.), 155 Fed. 612; *Robertson vs. Sewell*, 87 Fed. 536, 31 C. C. A. 107; *Bird Timber Co. vs. Snohomish County*, 81 Wash. 416, 143 Pac. 433;

Upshur vs. Pace, 15 Tex. 531. Said the court in *Wisconsin Railroad Co. vs. Price County,* 133 U. S. 496, 505, 10 Sup. Ct. 341, 344 (33 L. Ed. 687)."

And Judge Ross adds:

"* * * the survey of the public lands therein described was not a completed act until the approved plat thereof was filed in the local land office, and that, as the government survey of the lands was not a completed act at the time of the levy of the assessment, the lands involved in the third count were not then segregated from the public domain, which segregation I understand to be essential to any authority of the state to tax them. *Northern Pacific Ry. Co. vs. Trail County,* 115 U S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477."

Northern Pacific Ry. Co. vs. Thompson, 253 Fed. 178, C. C. A., Ninth Circuit.

"While, as above stated, it does not clearly appear from the opinion of the Supreme Court of Nevada in this particular case what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact that until lands are surveyed it is impracticable to identify them for the purpose of taxation."

Central Pacific Ry. vs. Nevada, 162 U. S. 512.

In the recent case of *Wilson Cyprus Company vs. Del Poso,* 236 U. S. 635, it was decided that land em-

braced by a Spanish Grant reported as valid by Land Commissioners, and confirmed by Act of Congress of May 23, 1828, to the extent of one square league, was segregated from the public domain, and subject to state taxes, on the making, in 1851, of the survey, said survey being made the foundation of the patent subsequently issued. The Court states that the grant, having been found valid in 1828, and granted by that Act, and the land having been actually surveyed and segregated in 1851, that then all of the conditions necessary to taxation were complied with.

Such cases as the Maish case, 164 U. S. 599, are clearly distinguishable from the case here. In that case, the delinquent tax list was, by statute, made prima facie evidence that the taxes described in the list were due against the property. There was no evidence that the Mexican grant involved in the case had not been surveyed or segregated from the public domain, and there was no evidence that the grant was not a perfect grant, with boundaries as certain and definite as those given by patent of a similar tract from the United States. The only matter of defense as to the character of the lands was that certain tracts of lands in the list were Mexican land grants, and that they had not been confirmed. Upon this state of facts, the Court, speaking by Mr. Justice Brewer, says:

> "It must be borne in mind, that in the record before us these land grants are not otherwise described than as Mexican land grants. For aught

that appears, they may have been 'perfect grants,' as they are sometimes called; that is, grants absolute and unconditional in form, specific in description of the land, passing a title from the Mexican government to the grantee as certain, definite and unconditional as a patent to a similar tract from the United States; and not 'imperfect grants'; that is, grants of so many acres or leagues of land within large exterior boundaries and based upon conditions precedent, and creating only an inchoate though equitable title to some as yet undefined and unsegregated tract. * * * within the reasoning and these decisions, as it does not appear that these lands were not held by perfect grants under the laws of Mexico, or that they were not in the possession of the appellants and covered with valuable improvements, it must be held that the objection to their taxation cannot be sustained."

In the present case it does appear affirmatively, and is not controverted, that the lands had never been surveyed, that title had never been affixed to any particular or specific tract, nor in any manner segregated from the public domain, and that the plaintiffs in error had never been in possession.

As these lands were not segregated from the public domain, they were, of necessity, still part of it.

"It is a familiar law that a state has no power

to tax the property of the United States within its limits. This exemption of their property from said state taxation—and by state taxation we mean any taxation by authority of the state, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such intereference of any other government as may tend to destroy its powers or impair their efficiency."

Wisconsin R'd Co. vs. Price Co., 133 U. S. 503.

This case in many respects resembles the case here. It was a question of taxation, and whether the State of Wisconsin had the authority to tax land claimed to be still a part of the public domain. The general principles controlling are stated by the Court (citing page 505), and are, that usually the possession of the legal title by the government determines both the fact and right of ownership; but with the exception, that where Congress has prescribed conditions, and provided that upon the performance of the conditions patnt shall issue, *the land alienated being distinctly defined, and the grantee not being excluded from the possession of the property,* and there being nothing further to be done, except the issuance of the patent, then the purchaser will be treated as the beneficial owner, and the land will be subject to taxation. It must follow, that where the land has never been definned, where the government refuses to define it by filing or approving the

survey, where the government has cancelled and attempted to annul the grant, and is issuing patents to others who are in possession, where the grantees under the Congressional Act are not in possession, and are in effect excluded from possession, the exception can have no application, the general rule must prevail, and the land be regarded as public domain.

The Enabling Act, approved June 20, 1910, under which Arizona was admitted as a State, provides:

> "That no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use."
>
> Paragraph Second, Sec. 20.

The Act admitting California to the Union contained a similar provision (as do nearly all, if not all, of the statehood acts), and it was there held, in *Central Pacific R. R. Co. vs. Howard,* 52 Cal. 227, that under this provision no parcel of the public lands could be taxed until a patent had issued to a private person, or until such private person had become vested with a perfect equity, without anything more to be paid, or any act to be done, going to the foundation of his right, and the case of *Railway vs. Prescott,* 16 Wall. 608, was cited in support.

There could be no equity in any particular lands until the specific lands were segregated from the great body of the public domain, and a survey, necessary to segre-

gation, would be somthing yet to be done, going to the foundation of a private right.

We submit, therefore, that neither the Territory nor the State of Arizona had any right to tax any of the property involved in this grant prior to December, 1914, and that the attempted levy and assessment of taxes for the years 1910, 1911 and 1912 were utterly void.

The trial court inclined to this view, as stated in its memorandum opinion (Tr. p. 220), but felt bound by the decision of the Supreme Court of Arizona in *State vs. Watts,* 21 Arizona 93, 185 Pac. 934. We cannot conceive that the decision of a State Court can control the Federal Courts in determining the question as to whether or not lands which have not been segregated from the public domain of the United States may be taxed by a state. If it be conceded, for the sake of argument, that such a decision is controlling, then we point out that the trial court overlooked the fact that in that case the assessments were made to the true owners, the property sufficiently described, and that the tax was held to be not upon the land itself but upon the claim which the claimants made thereto, which claim afterwards ripened into full title upon segregation being made from the public domain.

We have heretofore pointed out that the Arizona Supreme Court, in holding that such a "claim" is taxable prior to the segregation of the land, is contrary to the previous decisions of that court and is in conflict

with the decisions of the courts of other states and of the Supreme Court of the United States.

Here the assessment was made to a corporation which had no legal interest in Baca Location No. 3. The tracts of land attempted to be assessed were not described in such manner that the true owners could know that their property was being assessed. The owners of Baca Location No. 3, granted by Act of Congress, owned no mining claims, and assessment of mining locations constituted no notice to them that their property was being assessed, nor did the complaint in the suit to foreclose a lien upon such locations give any notice. If A is the owner of a tract of land in fee simple upon which B, under a mistaken idea of otherwise, attempts a mining location under the laws of the United States relating to such locations on the public mineral lands, what possible notice would the public records of tax proceedings against such mining claims convey to B that his own property was being assessed?

It is, of course, conceded by defendant in error that it obtained no title whatever by reason of the attempted mining locations. They were void; the land upon which they were located was not unappropriated public mineral lands upon which mineral locations could be made.

The assessment for taxes purported to be upon mining locations as such. The territory and state taxed something which in law did not exist. The

judgment attempted to foreclose a lien which did not in law exist, and the sheriff attempted to sell something which had no legal existence. If the decision in *State vs. Watts, supra,* be accepted that "claims" to such property may be taxed and sold for taxees, then certainly the purchaser at such a tax sale gets nothing but the "claim." If that claim ever ripens into title, the purchaser gets something, but if that claim does not ripen into title, the purchaser gets nothing. So in this case if the taxes were properly levied as upon a "claim" to land, which "claim" is of the nature of a mineral location, and such mineral location proves invalid, there could seem to be no doubt that the claim is worthless. The purchaser at the tax sale got no more than the taxpayer had, the State could not take from the taxpayer for the paymnt of taxes something which he did not have. If the taxpayer had nothing the state got nothing and the purchaser at the sale got nothing.

If the "claim" to the lands involved in *State vs. Watts* had been held invalid, it could not be contended that the lien for taxes attached to the land and was enforceable in the hands of some other person to whom the United States might have conveyed it.

THE JUDGMENT IN THE TAX PROCCEDINGS MAY BE COLLATERALLY ATTACKED IN THIS ACTION.

We believe we have heretofore shown that Baca Location No. 3, nor any of the lands embraced therein,

did not become taxable by the Territory or State of Arizona until segregated from the public domain on December 14th, 1914. Defendants in error, however, contend that the fact that the property was not subject to taxation is immaterial, because there was a proper judgment of the Superior Court of Santa Cruz County, Arizona, foreclosing the lien for taxes, and that the validity of that judgment cannot be collaterally attacked.

The general rule is that the judgment of a court having jurisdiction of the person and of the subject matter and jurisdiction to render the particular judgment which it did render is conclusive against collateral attack. If the judgment in question does not satisfy these three requirements, and each and all of them, it is void, a mere nullity, and can be collaterally attacked in this action of ejectment.

Unless it be held, as was held by the Supreme Court of Arizona, that the "claim" to the land embraced in the attempted mining locations only was assessed and that "claim" was the subject matter of the action to foreclose the lien, then the only other subject matter was the land itself, which was ordered sold for delinquent taxes. It was the *res.* No personal judgment was authorized by the statute.

Territory vs. Copper Queen Company, 13 Arizona 198.

The state had no power to tax the land, no power to

sell it for taxes and no power to affect it in any way whatsoever, and its action in assessing these taxes and ordering the lands sold, if that is the effect of the judgment, was beyond its jurisdiction and void. It would hardly be contended under our laws that the court of one county would have jurisdiction to render a judgment foreclosing a tax lien on land in another county. Such a judgment would be void as utterly beyond its jurisdiction. This is an exactly analogous case. Baca Location No. 3 was just as much outside the jurisdiction of the court of Santa Cruz County on the question of the enforcement of a tax lien as if it had been located in some other county or state.

One of the essentials of a valid judgment is that the court pronouncing it must have jurisdiction to render that particular judgment.

Windsor vs. McVeigh, 93 U. S. 274; *United States vs. Walker,* 109 U. S. 258; *Ritchie vs. Sayers,* 100 Fed. 520; *Russell vs. Shurtleff*, 28 Col. 414, 65 Pac. 27.

In *Willcox vs. Jackson,* 13 Peters 498, under an Act of Congress the Register and Receiver of a land office decided that an applicant for certain land who was then in possession was entitled to preempt the same, and issued their certificate and final receipt. This decision of the Register and Receiver was not appealed to the General Land Office. The suit was in ejectment, brought by the claimant against certain officers of the United States. The State Court of Illinois, in which

the action was brought, decided in favor of the defendant. The Supreme Court of Illinois reversed the judgment, deciding in favor of the plaintiff. The case then went to the Supreme Court of the United States by writ of error.

It was claimed by the defendant that the land had been withdrawn from entry by the President. It was urged by the plaintiff, however, that under the terms of the Act of Congress, the Register and Receiver of the Land Office acted judicially in determining that the claimant was entitled to the land. This view was accepted by the Supreme Court, which disposes of the question as follows:

> "Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection which was urged at the bar, which, if sustainable, would render that inquiry wholly unavailing. It is this—that the Acts of Congress have given to the Registers and Receivers of the land offices the power of deciding upon claims to the right of preemption — that upon these questions they act judicially—that no appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created; and even when there

is such an appellate power, the judgment is conclusive when it comes collaterally into question, so long as it is unreversed. But directly the reverse of this is true in relation to the judgment of any Court acting beyond the pale of its authority. The principle upon this subject is concisely and accurately stated by this Court in the case of *Elliott et al. vs. Peirsol et al.,* 1 Peters 340, in these words:

" 'Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it act without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void.'

"Now to apply this. Even assuming that the decision of the Register and Receiver, in the absence of fraud, would be conclusive as to the facts of the appellant then being in possession, and his cultivation during the preceding year, because these questions are directly submitted to them; yet if they undertake to grant preemptions in land in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a Court, whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance of a case beyond that sum."

Attention is also called to *Gibson vs. Chouteau,* 13 Wallace 92, and *Jourdan vs. Barrett,* 4 Howard 169.

THE DEED OF THE SHERIFF OF SANTA CRUZ COUNTY CONVEYED NOTHING.

The so-called mining locations had no legal existence. They were as if they never existed. Could the court, by adjudging that taxes were legally levied upon them, breathe into them the breath of life and constitute them something which the law had not theretofore recognized? What the sheriff was ordered to and did attempt to sell was "all the right, title and interest of Consolidated Mining, Smelter & Transportation Company in and to" certain mining locations, describing them by name and the book and page where their location notices were recorded in the office of the County Recorder. We repeat that if no such things existed in law before the tax was assessed, the judgment of the court that the tax was due and the order for the sale of the mining locations gave them no more validity than they had before.

The mining claims are described as patented mines. As a matter of fact, no patents are in existence. It is recited in the execution that "application for United States patents has been made upon each and all of the hereinbefore described mines and mining claims and final receipt has issued, but the patents have as yet not been issued." (Tr. pp. 144-115.) The laws of the United States require that one hundred dollars worth

of work or improvements be done upon each mining location each year. If such work is not done a mining claim is open to forfeiture. The purchaser bought only such rights as the locator had. If the effect of the judgment under consideration is that the locations were valid mining claims and the purchaser got them as such, the question is suggested whether he should continue to do assessment work upon them, and if he does not, who may take advantage of the failure.

In view of this branch of the case, it would seem that as to at least eight of the so-called mining claims the sheriff's sale was void. All but eight of the claims were separately sold and the return recites:

> "that after selling the above I continued to offer the said property in parcels until I had offered the whole thereof, and did receive no bid for the same; that thereupon I offered all of the remainder of said property not sold as aforesaid, to-wit:"

the eight remaining claims, described them by name, and which were sold in one lot. (Tr. pp. 140-141.)

The statute under which the suit was brought and prosecuted and the attempted sale made is Act Number 92 of the Laws of 1903, Session Laws of Arizona, 1903, page 162. This statute was adopted from the laws of Missouri. In *Territory vs Copper Queen,* 13 Arizona 198, reading page 215, it is said, in speaking of this statute:

> "This statute was adopted from Missouri, and a

prior construction thereof by the courts of last resort of the State of Missouri is, under well established principles, controlling upon us."

Such an action is one

"*Quasi in rem* to fix a lien upon specific property. No personal judgment can be had."

Territory vs. Copper Queen, supra.

In *Rosenblatt vs. Sargeant,* 76 Missouri 557, the sheriff had an execution for taxes against ten lots. The taxes all aggregated $687.33. The sheriff sold them separately and the first three lots sold brought more than enough to pay the taxes on all. The sheriff, however, proceeded to sell all the lots and it was contended that the sheriff should not have sold any of the lots after he had realized sufficient to pay the total amount of the judgment. The supreme Court of Missouri, however, said:

"The State has no lien upon one lot for the taxes charged against another lot, although both lots are owned by the same person; and the decree in the case before us directs, in substance, that each lot, or so much thereof as may be necessary, shall be sold for its own taxes, interest and costs. The judgment and execution cannot be otherwise construed without making them inconsistent with themselves, and in conflict with the statute. How can the decree, that a certain sum shall be levied of each lot, be enforced if the command of the execu-

tion, 'that of the property above described, or so much thereof as may be necessary, you cause to be made the judgment, interest and costs aforesaid,' be construed to mean that the sheriff should sell only as many of the lots as should be necssary to realize a sum sufficient to pay the taxes on all the lots? The only rational construction of the language quoted is that the sheriff should sell only so much of each of the several lots describd in the judgment and execution, as might be necessary to pay the taxes, interest and costs adjudged severally against the same.

"No complaint is made that the several lots should have been subdivided, and none could well be made, as each lot had only a frontage of twenty feet. Nor could the sheriff have sold all the lots in one body. This would have been in contravention of the decree, and of the rule that each lot must be sold for its own taxes. Cooley on Taxation, p. 432, and cases cited.

"It must be remembered that the Revenue Act of 1877, under which this suit was brought, provides for no personal judgment against the owners, but only for a judgment enforcing the tax lien against the land. Of the constitutionality of such a provision we have no question.

"When the claim for taxes is merged in a judgment, all right or power of distraint under the

statute is gone; the sheriff cannot then exercise it, nor can the court set aside its own decree and substitute therefor another mode of collecting the tax sued for. If the judgment was a personal one against the owner, the power of the sheriff over the proceeds of the sale of a lot, in excess of the tax due on the same, would perhaps be different. That one of several lots separately assessed and belonging to the same owner cannot be sold to pay the taxes due on all, has been expressly decided, under a statute similar to ours, in the case of *Hayden vs. Foster,* 13 Pick. 492, the opinion in which case was delivered by Chief Justice Shaw."

THE INTEREST OF THE PLAINTIFFS, DAVID W. BOULDIN AND HELEN LEE BOULDIN, COULD IN NO WISE HAVE BEEN AFFECTED BY THE JUDGMENT AND SALE IN THE TAX PROCEEDINGS, BECAUSE THEY WERE NOT PARTIES TO THAT ACTION.

Daisy Belle Bouldin, mother of David W. Bouldin and Helen Lee Bouldin, died in 1907. At the time of her death she was the owner of a half interest in the north half of Baca Location No. 3, and at her death her interest descended to David W. Bouldin and Helen Lee Bouldin, her only children and her heirs at law. The proceedings for the collection of these delinquent taxes was begun in 1913, and Daisy Belle Bouldin was made a party defendant to that action. She had been

dead five years and her interest had descended to her children.

Under the great weight of authority the proceedings in the tax case could not affect the one-half interest which was owned by Daisy Belle Bouldin in her life-time, but which was owned by her children at the time the taxes were levied, and suit brought, since they were not parties to the suit.

Allen vs. Ray, 86 Mo. 542, 10 S. W. 153; *Williams vs. Hudson,* 6 S. W. 261; *Kohlman vs. Glaudi,* 52 La An. 700, 27 So. 116; *Millaudon vs. Gallagher,* 104 La. 713, 29 So. 307; *Boagni vs. Pac. Imp. Co.* 111 La. 1063, 36 So 129; *Morrill vs. Lovett,* 95 Maine 165, 49 Atl. 666.

We submit that the judgment of the trial court is erroneous and that it should be reversed and judgment ordered entered in this court for plaintiffs in error.

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